SUPREME COURT OF KENTUCKY
CASE NO. 2015-SC-000371-TG

KENTUCKY RESTAURANT ASSOCIATION, INC., KENTUCKY RETAIL FEDERATION, INC., and PACKAGING UNLIMITED, LLC — **APPELLANTS**

v.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
JUDITH MCDONALD-BURKMAN, JUDGE
CASE NO. 15-CI-000754

LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT — **APPELLEE**

APPELLANTS' BRIEF

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of this **Appellants' Brief** were served by first class U.S. mail, postage prepaid, this 23rd day of November, 2015 upon the following: Michael J. O'Connell, E. Patrick Mulvihill, David A. Sexton and Sarah J. Martin, Jefferson County Attorney, 531 Court Place – Suite 900, Louisville, KY 40202; Clerk of Jefferson Circuit Court, Louis D. Brandeis Hall of Justice, 600 W. Jefferson Street, Louisville, Kentucky 40202; Honorable Judith McDonald-Burkman, 700 W. Jefferson Street, Louisville, Kentucky 40202. The undersigned further certifies that Appellants have returned the record on appeal.

COUNSEL FOR APPELLANTS

INTRODUCTION

This case concerns whether Louisville possesses the authority to adopt a minimum wage ordinance imposing wage rates higher than those contained in the General Assembly's comprehensive statewide scheme regulating wages, hours, and other conditions of employment found in KRS Chapter 337, the Kentucky Wages and Hours Law. Appellants contend that Louisville does not possess the authority to do so, as the Ordinance: (1) conflicts with a comprehensive statewide scheme of legislation on the same general subject matter, (2) makes unlawful that which is lawful under state law, and (3) co-opts the Legislative remedies for enforcing KRS Chapter 337 by appropriating a private judicial remedy to enforce the Ordinance.

STATEMENT CONCERNING ORAL ARGUMENT

Appellants request oral argument, which they believe will assist the Court in deciding the important legal issues presented in this case.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

A. Metro Louisville Adopts An Ordinance Imposing Higher Minimum Wage Rates Than Found In The State's Comprehensive Wages And Hours Law.

On January 2, 2015, Louisville Mayor Greg Fischer signed Ordinance No. 216, Series 2014 (O-470-14), "An Ordinance Relating To Minimum Wage To Be Paid To Employees By Employers In Louisville Metro" (the "Ordinance"), which the Louisville Metro Council had adopted in late December 2014. The Ordinance has required most Louisville employers to pay a minimum of $7.75 an hour since July 1, 2015. Beginning July 1, 2016, the Ordinance will require those employers to pay a minimum of $8.25 an hour. The minimum wage will increase to $9.00 an hour beginning on July 1, 2017, with increases thereafter tied to the consumer price index.

At the time of its adoption, the Ordinance was the first of its kind in the Commonwealth, and among 30 or so such ordinances adopted by cities throughout the United States. On November 19, 2015, the Lexington-Fayette Urban County Council voted to adopt an ordinance scheduled to take effect on July 1, 2016, which will raise Lexington-Fayette's minimum wage to $10.10 an hour by July 1, 2018. Thus, nearly 25% of the state's population will be directly affected by any final decision in this case.

B. Procedural History Of This Litigation

1. Appellants seek declaratory relief.

Appellants, Kentucky Restaurant Association, Inc. ("KRA"), Kentucky Retail Federation, Inc. ("KRF"), and Packaging Unlimited, LLC ("Packaging Unlimited") (collectively, "Plaintiffs"),[1] filed the Circuit Court action on February 13, 2015 seeking to

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[1] KRA and KRF are trade associations whose members include restaurants and retailers located within the jurisdictional boundaries of Louisville/Jefferson County. (R. 1-7, 170-173). Such members employ individuals in Louisville/Jefferson County who are compensated at the minimum wage standard set forth in KRS Chapter 337. Appellant, Packaging Unlimited, LLC, also employs individuals who are

void the Ordinance, adopted by Appellee, Louisville/Jefferson County Metro Government ("Louisville").[2] Appellants sought a declaration that the Ordinance is not a valid exercise of Louisville's power, as well as an injunction barring the Ordinance's enforcement.

Because the controlling facts were undisputed, solely requiring resolution of questions of law, Appellants filed a Motion for Judgment on the Pleadings on April 7, 2015 shortly after receiving Louisville's Answer (R. 32-77; Appellants' Mot. for J. on the Pleadings). Louisville filed its own Motion for Judgment on the Pleadings on May 4, 2015 (R. 81-108). After Appellants filed their Response/Reply (R. 129-156), and Louisville filed its Reply (R. 157-167), the Circuit Court held a hearing on June 10, 2015 (R., June 10, 2015 video hearing).

2. The Circuit Court denies relief.

On June 29, 2015, the Circuit Court issued its final and appealable Order denying Appellants' Motion for Judgment on the Pleadings, granting Louisville's Motion for Judgment on the Pleadings, and deeming the Ordinance lawful and enforceable. *See* Order, attached at Tab A (R. 174-177).

3. The Ordinance goes into effect after a Court of Appeals Judge denies emergency relief.

Appellants immediately filed a Notice of Appeal pursuant to CR 73 from the Circuit Court's Order, and the next day submitted a combined Motion for Intermediate Relief/Motion for Emergency Relief pursuant to CR 76.33 and CR 65.08(7), seeking to

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compensated at the minimum wage standard set forth in KRS Chapter 337. Thus, since July 1, 2015, the Ordinance has required Appellants and their member-employers to pay certain employees a wage above the minimum prescribed by KRS Chapter 337.

[2] Although the legal name for Louisville's government is Louisville/Jefferson County Metro Government, which extends to the territorial boundaries of Jefferson County, KRS 67C.101 (5), (6), the Appellee will be referred to herein simply as "Louisville."

enjoin the Ordinance from going into effect on July 1, 2015, as scheduled, pending final appellate resolution of the governmental powers questions raised. A Court of Appeals Judge denied that relief in a June 30, 2015 Order, attached at Tab B (R. 180-192).

4. This Court grants Appellants' unopposed Motion for Transfer.

Appellants then filed an unopposed motion to transfer to this Court (from the Court of Appeals, Case No. 2015-CA-000996-MR), which this Court granted on September 24, 2015.

ARGUMENT

A. Standard Of Review/Preservation Of Error.

On this appeal from an Order denying declaratory relief concerning the validity of the Louisville Ordinance, this Court reviews those questions of law *de novo*. *See, e.g.*, *City of Pioneer Village v. Bullitt County ex rel. Bullitt Fiscal Court*, 104 S.W.3d 757, 759 (Ky. 2003) (addressing CR 12.03 motion for judgment on the pleadings). A motion for judgment on the pleadings tests the "legal sufficiency of a claim or defense in view of all the adverse pleadings," and is intended to expedite termination of a lawsuit – as here – in which the controlling facts are undisputed and only questions of law remain to be decided. *Id.* Moreover, as a determination of law, this Court is not bound by a trial court's legal conclusions. *See, e.g*, *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002).

The parties comprehensively briefed and argued before the Circuit Court the legal questions presented herein, thus preserving those issues before this Court. *See, supra*, at pp. 1-2.

B. The Commonwealth's Home Rule Jurisprudence Bars Local Governments From Adopting Ordinances In Conflict With State Law.

Louisville claimed below to possess a complete grant of home rule, unencumbered by any limiting language mandating that ordinances not be in conflict with state law. Our State Constitution, myriad statutes, and a multitude of appellate decisions conclusively tell a different story.

1. Local governments have only the powers granted by the General Assembly.

Kentucky local governments "have only such powers as have been granted by the legislature, expressly or necessarily implied" and are "**prohibit[ed] [from] exercising any authority in excess thereof or in a manner different from that permitted.**" *Boyle v. Campbell*, 450 S.W.2d 265, 268 (Ky. 1970) (emphasis added) (citing *City of Middlesboro v. Kentucky Utilities Co.*, 284 Ky. 833, 146 S.W.2d 48, 52 (1940)). Implicit in the State's grant of authority to local governments is the understanding that they are subordinate to the State. *City of Harlan v. Scott*, 290 Ky. 585, 162 S.W.2d 8, 9 (1942) ("all municipal authority comes from the Legislature"). "An ordinance in conflict with a state law . . . is universally held to be invalid." *Boyle*, 450 S.W.2d at 268.

2. Kentucky's Constitution and statutes prohibit local governments from adopting ordinances in conflict with state law.

Although the Kentucky Constitution and statutes permit a limited measure of home rule, local governments may not thereby ignore or rewrite statewide standards. For example, while Kentucky Constitution §156b authorizes the General Assembly to permit municipal home rule for cities, it expressly forbids cities from exercising any power or performing any function in conflict with a constitutional provision or state statute.[3]

Under KRS 67C.101, the General Assembly granted Louisville and Jefferson County the right to approve and implement a consolidated local government, with the power and authority to adopt and enforce ordinances which are not inconsistent with state law.

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[3] ("The General Assembly may provide by general law that cities may exercise any power and perform any function within their boundaries that is in furtherance of a public purpose of a city ***and not in conflict with a constitutional provision or statute***.") (emphasis added)

Similarly, in KRS 83.410, .420, and .520, the General Assembly granted limited Home Rule to first class cities, i.e., Louisville (the only such city). KRS 83.410(1) ("This chapter [KRS Chapter 83] is intended by the General Assembly of the Commonwealth of Kentucky to grant to citizens living within a city of the first class the authority to govern themselves to the full extent required by local government ***and not in conflict with the Constitution or laws of this state*** or by the United States."); KRS 83.420 ("The inhabitants of each city of the first class shall constitute a corporation, with power to govern themselves by any ordinances and resolutions for municipal purposes ***not in conflict with the Constitution and laws of this state*** or of the United States.") (emphasis added).[4]

Finally, through KRS 82.082 – commonly referred to as the "Home Rule Statute" – the General Assembly granted local governments the ability to exercise any power and perform any function within their boundaries that is not in conflict with a state statute. That provision further explains that a "power or function is in conflict with a statute if it is expressly prohibited by a statute or there is a comprehensive scheme of legislation on the same general subject embodied in the Kentucky Revised Statutes . . . ." KRS 82.082(2).

These provisions – Kentucky Constitution §156b, KRS 67C.101, KRS 83.410, .420 and .520, and KRS 82.082 – collectively supply the applicable authority delineating

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[4] Louisville argued below that KRS 83.520 grants it essentially plenary powers through an ostensibly "complete grant of home rule." (R. 83-85). But that conclusion may only be reached by both ignoring the KRS 83.520 limitation that ordinances may not "conflict with the Constitution," *see* §156b, and by reading this provision out of the context in which it was enacted, including the simultaneously enacted KRS 83.410, which provides that "this Chapter" grants home rule to the extent it is "not in conflict with the Constitution or laws of this state or by the United States." *See*, e.g., *Falk v. Alliance Coal, LLC*, 461 S.W.3d 760, 764 (Ky. 2015) ("nothing requires a statute's subsection to be read in a vacuum rather than in the context of the entire statute") (citation omitted).

Louisville's home rule powers. Together, they prevent Louisville from enacting ordinances inconsistent with state law, expressly prohibited by Kentucky statutes, or if there is a comprehensive scheme of state legislation on the same general subject matter.

3. This Court, the Attorney General, and the Legislative Research Commission have all concluded that Louisville may not adopt ordinances in conflict with state law.

Analyzing a different Louisville ordinance, this Court held it invalid because it was in conflict with a comprehensive scheme of regulation on the same general subject matter, pursuant to KRS 82.082. *Ky. Licensed Beverage Ass'n v. Louisville-Jefferson Cnty. Metro Gov't*, 127 S.W.3d 647, 648-49, 651 (Ky. 2004) (invalidating a Louisville ordinance based upon the KRS 82.082 comprehensive scheme test).

The Kentucky Attorney General has also opined, in analyzing the validity of a Louisville ordinance, that KRS 82.082(2) is among the statutes that limit "the breadth of the legislative grant of power contained in KRS 83.520..." OAG 93-71 (1993). The opinion concludes that "cities of the first class, like any other city of the Commonwealth ... may not exercise a power or function if it is expressly prohibited by a statute or if there is a comprehensive scheme of legislation on the same general subject embodied in the Kentucky Revised Statutes." *Id.* at 2. The opinion, although not binding on our courts, is "highly persuasive" authority, to which courts give "great weight." *York v. Commonwealth*, 815 S.W.2d 415, 417 (Ky. App. 1991).

Kentucky's Legislative Research Commission likewise concludes that KRS 82.082 applies to determining the validity of Louisville ordinances. See, Kentucky LRC, Informational Bulletin No. 145: Kentucky Municipal Statutory Law (Nov. 2014), available at http://www.lrc.ky.gov/lrcpubs/ib145.pdf at p. 45.

4. Canons of statutory construction further compel application of KRS 82.082.

Louisville conceded below that "KRS 82.082 applies to all cities in Kentucky," including Louisville. (R. 157). And for good reason, as this Court, the Attorney General, and the Legislative Research Commission have all relied upon KRS 82.082 in assessing the validity of Louisville ordinances, a conclusion supported by well-established canons of statutory construction.

KRS 82.082 was enacted in 1980,[5] eight years after the Legislature had enacted KRS 83.410, .420, and .520.[6] The General Assembly is presumed to be aware of previously enacted statutes when it enacts later statutes. *See, e.g., Haven Point Enterprises, Inc. v. United Ky. Bank, Inc.*, 690 S.W.2d 393, 395 (Ky. 1985). By enacting KRS 82.082 in 1980, the General Assembly was not only "restat[ing] the well-established common law in Kentucky on the relationship of local ordinances to state law,"[7] it was providing explanation for the kind of conflict which would invalidate an ordinance. There can be no dispute that KRS 82.082, as the later enacted and more specific statute addressing the conflicts question, governs the analysis. *See, e.g., Troxell v. Trammell*, 730 S.W.2d 525, 528 (Ky. 1987). And KRS 82.082, along with all of the other home rule statutes addressed in this case – including Kentucky Constitution §156b, KRS 67C.101, KRS 83.410, .420, and .520 – must be construed *in pari materia*, i.e., read together so as to be applied in the same manner. *See, e.g., Economy Optical Co. v. Kentucky Board of Optometric Examiners*, 310 S.W.2d 783, 784 (Ky. 1958).

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[5] 1980 Ky. Acts, ch. 239, sec. 2.

[6] 1972 Ky. Acts, ch. 243, secs. 1, 2, 12.

[7] Kentucky LRC, Informational Bulletin No. 145: Kentucky Municipal Statutory Law (Nov. 2014), available at http://www.lrc.ky.gov/lrcpubs/ib145.pdf at p. 43.

The net effect of all these home rule provisions is that Louisville may not adopt ordinances in conflict with a comprehensive scheme of state legislation on the same general subject matter.

C. Because The Ordinance Conflicts With A Comprehensive Scheme Of Legislation On The Same General Subject Matter Found In KRS Chapter 337, It Cannot Survive.

1. In its 44 separate statutory provisions and 20 regulations, the Wages and Hours Law comprehensively governs employer-employee relations in the Commonwealth.

The Kentucky Wages and Hours Law, KRS 337.010 *et seq.*, establishes the Commonwealth's entire statutory scheme with respect to wages and hours, with its 44 separate provisions comprehensively covering the payment of wages, overtime, exemptions, tipped employees, record keeping requirements, rest and lunch periods, unlawful withholdings, wage discrimination, and prevailing wages. It also establishes employee rights to file a private cause of action in Circuit Court, or to request that the Department of Labor address wage concerns through its legislatively granted power to investigate and enforce the Wages and Hours Law. And among these powers is the authority to promulgate administrative regulations. *See* KRS 337.295, .520 (authorizing Department of Labor to issue regulations; under this authority, the Department has issued 20 regulations to enforce and interpret the Wages and Hours Law, found at 803 KAR 1:005-1:120).[8]

Among its myriad provisions comprehensively regulating the employment relationship, the Wages and Hours Law establishes the minimum wage employers must pay employees within the Commonwealth, including Louisville:

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[8] http://labor.ky.gov/dows/doesam/Documents/KY%20Wage%20and%20Hour%20Poster%20English.pdf (poster all Kentucky employers are required to post under KRS 337.325, summarizing their myriad obligations under the Wages and Hours Law, attached at Tab C).

> Except as may otherwise be provided by this chapter, every employer shall pay to each of his employee's wages at a rate of not less than five dollars and eighty-five cents ($5.85) an hour beginning on June 26, 2007, not less than six dollars and fifty-five cents ($6.55) an hour beginning July 1, 2008, and not less than seven dollars and twenty-five cents ($7.25) an hour beginning July 1, 2009. If the federal minimum hourly wage as prescribed by 29 U.S.C. sec. 206(a)(1) is increased in excess of the minimum hourly wage in effect under this subsection, the minimum hourly wage under this subsection shall be increased to the same amount, effective on the same date as the federal minimum hourly wage rate. If the state minimum hourly wage is increased to the federal minimum hourly wage, it shall include only the federal minimum hourly rate prescribed in 29 U.S.C. sec. 206(a)(1) and shall not include other wage rates or conditions, exclusions, or exceptions to the federal minimum hourly wage rate. In addition, the increase to the federal minimum hourly wage rate does not extend or modify the scope or coverage of the minimum wage rate required under this chapter.

KRS 337.275(1).

The minimum wage rates and remedial rights set forth in these statutes reflect a conscious legislative intent to comprehensively establish statewide standards of general applicability.

2. The Legislative history behind the Wages and Hours Law reflects the Legislature's intent to standardize wage and hour standards throughout the Commonwealth.

The entire statutory scheme conspicuously excludes any provisions permitting local control over wage and hour matters, further bolstering the conclusion that the Legislature intended the uniform application of wage and hour standards throughout the Commonwealth. *See Kentucky Municipal League v. Commonwealth*, 530 S.W.2d 198, 200 (Ky. 1975) (rejecting municipal challenge to 1974 legislation establishing minimum wage rate, this Court's predecessor noted that the recently enacted "provisions for minimum wages and overtime payments . . . apply to all employees (with enumerated

exemptions) regardless of whether they are engaged in work of state-wide concern or of purely local concern").[9]

This Court has concluded that a predecessor statute – the Women and Minors' Employment Act – constituted a "comprehensive statutory scheme establishing procedures to ensure that women and minors were neither overworked nor underpaid." *Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354, 359-60 (Ky. 2005). That scheme was subsequently codified within the Wages and Hours Law, which was extended in 1966 to cover not just women and minors in certain job classifications, but "any employee." In 1974, the Legislature again amended the Wages and Hours Law by, among other things, "adopting the minimum wage mandated by the federal Fair Labor Standards Act." Indeed, the Legislature has increased the comprehensive nature of the "statutory scheme" with each successive iteration. Through all of these amendments, the "statutory scheme" has continued to comprehensively address the general subject matter of wages and hours, including minimum wages to be paid by employers throughout the Commonwealth.

Significantly, prior to 1974, KRS Chapter 337 – as then codified in the Women and Minors' Employment Act – had a unique enforcement mechanism utilizing local wage boards, concerning which this Court's predecessor explained:

> In this act, the legislature made the cost of living an element in the determination of a fair minimum wage, and it is common knowledge that there is a wide discrepancy between the cost of living in different localities in this Commonwealth. The General Assembly undoubtedly realized this when it made it possible for the Commissioner [of Industrial Relations]

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[9] The Legislature's intent is further evident from the failure of House Bill 96 in the 2015 General Assembly (R. 58-59, attached at Tab D), which would have granted consolidated local governments such as Louisville and Lexington the authority to adopt different local minimum wage standards. Had such authority previously existed, there would have been no reason to propose or enact such a statute. *See, e.g., Jefferson Cnty. Bd. of Educ. v. Fell*, 391 S.W.3d 713, 724-25 (Ky. 2012) (recent legislative activity, including bills introduced but never enacted, are relevant to determine statute's meaning and purpose); *Fiscal Ct. of Jefferson Cnty. v. Louisville*, 559 S.W.2d 478, 480 (Ky. 1977) ("Bills presented but not passed may have some bearing" on statutory interpretation).

> and the [local] Wage Board to consider and act on facts which establish the differences in the various localities.

Young v. Willis, 305 Ky. 201, 203 S.W.2d 5, 7-8 (1947).

In comprehensively amending KRS Chapter 337 in 1974 – largely taking its current form – the General Assembly did away with the local wage boards and their consideration of local cost of living issues. Indeed, except for the prevailing wage provisions found at KRS 337.505 - 337.550 (solely applicable to governmentally funded works projects), the remainder of KRS Chapter 337 now contains no reference to local boards or local conditions. These statutory amendments thus undermine the justification for different wage rates among Kentucky's cities and counties.

Canons of statutory construction dictate that when the Legislature elects to change a statute it does so in order to accomplish a purpose. *See, e.g.*, *Castle v. Commonwealth*, 411 S.W.3d 754, 758 (Ky. 2013) ("When amending or enacting legislation, we presume the Legislature knows and understands the then-existing laws, including the judicial construction of those laws. Ancillary to this presumption, 'it must be presumed that the Legislature intended *something* by what it attempted to do' when amending a statute – namely to change the law.") (citations omitted). Here, by enacting wage and hour standards generally applicable throughout the Commonwealth – and doing away with local wage boards tasked with addressing local conditions – the General Assembly accomplished its legislative goal of ensuring uniform wage and hour standards throughout the state. Accordingly, Louisville's attempt to adopt standards at odds with those established by the General Assembly cannot stand.

3. An Ordinance which conflicts with a comprehensive statutory scheme cannot survive.

There are numerous instances in which our appellate courts have stricken ordinances deemed to run afoul of similarly comprehensive statewide legislation. For example, in a case also arising out of Louisville, this Court invalidated Louisville's adoption of an ordinance at odds with the Legislature's comprehensive scheme of legislation dealing with the manufacture, sale and distribution of alcoholic beverages. *Ky. Licensed Beverage Ass'n*, 127 S.W.3d 647 (invalidating an ordinance purporting to vest the local ABC administrator with jurisdiction to impose civil fines upon employees of ABC licensees; the Court reasoned that, in enacting its comprehensive scheme of legislation dealing with the regulation of alcoholic beverages, the General Assembly purposely prescribed no means whereby local administrators could levy fines upon a non-licensee); *see also City of Harlan*, 162 S.W.2d at 9-11 (invalidating an ordinance purporting to prohibit Sunday operation of movie theater because it conflicted with state statute, which allowed such operations; this Court's predecessor held ordinance invalid "since all municipal authority comes from the Legislature and municipal ordinances must be in harmony with the general laws of the State"); *Sheffield v. City of Fort Thomas*, 620 F.3d 596 (6th Cir. 2010) (state regulation comprehensively addressing fish and wildlife resources preempted ordinance attempting to ban deer feeding on homeowners' property, as the ordinance prohibited conduct which was explicitly permitted under state law);[10]

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[10] The Sixth Circuit undertook a comprehensive examination of Kentucky home rule, including the context in which the Home Rule Statute was adopted, observing that it "merely *restates the well-established common law* in Kentucky on the relationship of local ordinances to state law." *Sheffield,* 620 F.3d at 611 (citing Kentucky Legislative Research Commission, Information Bulletin No. 145: Kentucky Municipal Statutory Law (Sept. 2003)) (emphasis added by Court). The court noted numerous expressions of that common law by this Court's predecessor, dating as far back as 1851. *Id.* at 609 (citing *March v. Commonwealth*, 51 Ky. 25, 12 B. Mon. 25 (1851) ("A power vested by the Legislature in a city corporation . . . cannot be considered as imparting by implication a power to repeal the laws of the State,

Pierce v. Commonwealth, 777 S.W. 2d 926, 928 (Ky. 1989) (this Court held that a city ordinance criminalizing solicitation of sodomy conflicted with "KRS 506.030, [in which] the General Assembly designed a comprehensive approach to prohibiting the solicitation of criminal acts"; because "the General Assembly chose the language used in the statute, we must conclude it did so intentionally and we cannot approve an ordinance which amounts to an enlargement of the conduct proscribed by the act of the General Assembly"). Simply put, these cases stand for the proposition that, where a conflict exists, the local ordinance is invalid.

And when a comprehensive statutory scheme does not exist – such as the absence of statewide legislative standards addressing public smoking, but instead only a handful of disparate statutes merely tangentially touching upon the matter – this Court has had no qualms in holding that local governments possess the power to fill the void. *See Lexington-Fayette County Food & Beverage Ass'n v. Lexington-Fayette Urban County Gov't*, 131 S.W.3d 745 (Ky. 2004) (holding that Lexington had the authority to enact a local smoking ban to address local public health concerns, because there were no statewide standards addressing public smoking, and thus no conflict).[11] But this holding does not justify local governments adopting their own minimum wage standards. The absence of statewide public smoking standards created no conflict with the Lexington smoking ordinance; by contrast, the statewide minimum wage standards found in KRS

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or supersede them by any of its ordinances.") and *Arnold v. Commonwealth ex rel. City of Somerset*, 309 Ky. 620, 218 S.W.2d 661, 662 (1949) ("municipal authorities . . . cannot adopt ordinances which infringe upon *the spirit of* a state law or are repugnant to the *general policy* of the state")) (emphasis added by Sixth Circuit).

[11] This Court observed that the "five separate statutory provisions which touch on smoking" cited by those challenging Lexington's smoking ordinance were merely a "collection of various statutes that mention smoking in a specific context," and thus did not establish "a comprehensive system of legislation on smoking. . ." *Id.* at 751.

Chapter 337 pose an inherent conflict with an ordinance attempting to regulate the same subject matter, and imposing different standards than those in effect throughout the state.

The history, text, and authority concerning the Kentucky Wages and Hours Law – establishing statewide wage and hour standards – compels the conclusion that it is a "comprehensive scheme of legislation on the same general subject matter" as the Ordinance. Accordingly, Louisville does not possess the power to deviate from that comprehensive scheme of wage and hour laws.

D. The So-Called "Savings Provision" In KRS 337.395 Does Not Permit A Local Government To Create A Higher Minimum Wage Rate Than That Established Under State Law.

The Ordinance prominently cites KRS 337.395, a so-called "savings provision" in the Wages and Hours Law, which ostensibly justifies the higher local minimum wage rate. (R. 52-56, attached at Tab E, at 1, noting that KRS 337.395 permits more favorable wage standards "in effect under any other law ***in*** [sic] the state of Kentucky"). But KRS 337.395 merely provides that wage standards "in effect under any other law ***of*** this state which are more favorable to employees than standards" contained in the Wages and Hours Law "shall continue in force and effect." (emphasis added). The language of KRS 337.395 contemplated pre-existing state statutes, not local ordinances adopted *ex post facto*.

Settled principles of statutory construction compel the conclusion that KRS 337.395 does not grant local governments the authority to adopt wage and hour standards at odds with state law. KRS 337.395 was enacted in 1974,[12] two years after the General Assembly had enacted statutes addressing the home rule power of first class cities, i.e.,

[12] 1974 Ky. Acts, ch. 391, sec. 10.

Louisville (the only such city). *See* KRS 83.410(1) (granting home rule "to the full extent required by local government and not in conflict with the Constitution or ***laws of this state*** or by the United States"); KRS 83.420 (first class city inhabitants "shall constitute a corporation, with power to govern themselves by any ordinances and resolutions for municipal purposes not in conflict with the Constitution or ***laws of this state*** or the United States.") (emphasis added in both).[13] Both of these statutes make it clear that the "laws of this state" to which they refer are state statutes, not local ordinances, as any other reading would be nonsensical. The only construction that makes sense in comparing these statutes is that cities of the first class, just like all other cities, are precluded from adopting ordinances in conflict with "laws of this state," i.e., state statutes. And the Legislature, in enacting KRS 337.395 and using the phrase "laws of this state" therein, is deemed to have been aware of the construction it placed upon that same phrase just two years earlier in enacting KRS 83.410 and KRS 83.420. *See*, *e.g.*, *Haven Point Enterprises, Inc.*, 690 S.W.2d at 395.

Accordingly, KRS 337.395 does not grant Louisville authority to adopt the Ordinance.

E. The Ordinance Conflicts With State Law By Making Unlawful That Which Is Lawful Under State Law.

An ordinance "***cannot forbid what a statute expressly permits*** and may not run counter to the public policy of the state as declared by the Legislature." *City of Harlan*, 162 S.W.2d at 9 (emphasis added) (barring enforcement of local ordinance attempting to prohibit operation of movie theaters on Sunday evenings when such was permitted under state laws addressing the same subject); *Arnold*, 218 S.W.2d at 662-63 (holding

[13] 1972 Ky. Acts, ch. 243, secs. 1, 2.

ordinance void because it conflicted with statute; "a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized, permitted, or required . . . .") (citation omitted).

Without dispute, the Legislature "has expressly licensed, authorized, and permitted" employers throughout the Commonwealth to lawfully pay any wage ranging from $7.25 - $8.99 an hour. But as of July 1, 2015, the Ordinance has made unlawful the payment of less than $7.75 an hour by Louisville employers. Thus, Louisville employers paying their employees from $7.25 to $7.74 an hour – conduct clearly lawful under state law – are in violation of the Ordinance and subject to Louisville-imposed civil penalties, and potential civil actions by their employees.

Ultimately, the Ordinance will prohibit Louisville employers from paying a wage ranging from $7.25 - $8.99 an hour. In doing so, the Ordinance attempts to prohibit conduct which is specifically permitted under Kentucky law. Because this demonstrates a direct conflict between the Ordinance and state law, the Ordinance cannot survive.

F. The Ordinance Is Inconsistent With The Statewide Application Of Consistent Wage And Hour Standards.

Kentucky's Wages and Hours Law was intended to be a law of general application throughout the Commonwealth. The consequences of permitting piecemeal local regulation have recently been acknowledged in the context of another dispute involving the power of local governments to regulate the employer-employee relationship.

In a March 13, 2015 amicus brief opposing Hardin County's right-to-work ordinance (R. 61-72, attached at Tab F), the Kentucky Attorney General – the Commonwealth's chief law enforcement officer – expressed concerns about the

Commonwealth's "obvious and significant public interest in determining uniformity of working terms and conditions throughout the state . . . ." Br. of the Commonwealth of Kentucky as *Amicus Curiae*, pp. 10-11, *United Auto., Aerospace and Agric. Implement Workers of Am. Local 3047 v. Hardin Cnty.*, Case No. 3:15-cv-66. And just as a patchwork of right-to-work ordinances varying between Kentucky's 120 counties and over 400 cities would create an "impossibly uncertain legal framework in the area of union security agreements," the same can also be said for different local wage and hour standards. *Id.* at 11. There is absolutely no reason to think that the Legislature intended this result.

Public policy considerations further counsel against such a broad interpretation of home rule power (and against such a narrow interpretation of the comprehensive scheme found in KRS Chapter 337) with respect to regulation of the employer-employee relationship. *See, e.g.*, *Kentucky Harlan Coal Co. v. Holmes*, 872 S.W.2d 446, 451 (Ky. 1994) (the Legislature possesses police power to legislate public policy in the area of employer/employee relations); *see also Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 807 (Ky. 2009) ("Shaping public policy is the exclusive domain of the General Assembly.").

Should this Court conclude that Louisville possesses the virtually unlimited powers it claims to have, not only would this approval of piecemeal local enactments have a profound impact on the payment of wages throughout the Commonwealth, it would open the proverbial floodgates to additional local regulation of the employer-employee relationship, limited only by the imagination and self-restraint of local governing bodies.

One need not venture too far into other cities' existing regulatory forays to see where this could lead – including paid leave, family and medical leave, predictive scheduling, formula retail regulation, and limits on part-time work – just to name a few.[14] Indeed, one could easily substitute Louisville's current arguments to support a future ordinance prohibiting termination without just cause, requiring paid holiday leave, or creating a similar, fundamental change to the laws and regulations governing Kentucky's employment relationships.

And Louisville's Metro Council has not been reticent in following the lead of other cities, whether through a minimum wage Ordinance or through other enactments, such as a so-called Ban the Box ordinance barring the City and its vendors from inquiries into applicants' criminal backgrounds. *See* Ordinance No. 046, Series 2014.[15] So, it is not at all speculative to suggest that other similarly restrictive local encroachments on the employer-employee relationship may follow.

G. Louisville Cannot Create A Private Judicial Cause Of Action To Enforce An Ordinance Which Conflicts With State Law.

As noted above, Kentucky cities have only those "home rule" powers granted by the General Assembly. The Legislature enacted the Wages and Hours Law to implement statewide wage and hour standards, enforceable in Kentucky courts or through the state Department of Labor. *See Parts Depot, Inc.*, 170 S.W.3d at 359-62. And just as the Legislature did not authorize local governments to impose a minimum wage higher than

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[14] *See, e.g.*, San Francisco Labor Laws (http://sfgsa.org/index.aspx?page=430), including the Minimum Wage Ordinance, Paid Sick Leave Ordinance, Health Care Security Ordinance, Family Friendly Workplace Ordinance, Fair Chance Ordinance (limiting employer use of employee criminal histories), and Formula Retail Employee Rights Ordinances (otherwise known as the Retail Workers' Bill of Rights, and addressing *inter alia* employee scheduling, part-time work, and employee retention).

[15] The ordinance is available at: https://louisvilleky.gov/sites/default/files/metro_council/pdf_files/ord0462014banthebox.pdf

that applicable generally throughout the Commonwealth, it did not endow local governments with any authority to create private rights of action for violating an ordinance.

The Ordinance, however, purports to create a private right of action:

> Any Employee who is paid less than the minimum wage established under the provisions of § 112.04, may bring a civil cause of action, authorized in KRS 337.020, against his/her Employer for the full amount of wages due from the Employer.

Ordinance, § 112.99(D)(1). This provision of the Ordinance, which is an integral part of its enforcement machinery, is invalid and unenforceable as a matter of law.

Local governments are prohibited from "co-opt[ing] the legislature's authority, ignor[ing] the legislature's intended purpose, and disregard[ing] the plain language of the statute, in order to encourage a policy not envisioned or intended by the Kentucky Legislature." *Hardwick v. Boyd County Fiscal Court*, 219 S.W.3d 198, 202 (Ky. App. 2007) (striking ordinance imposing an occupational license tax at odds with the legislative grant of authority on the subject); *see also Ky. Licensed Beverage Ass'n*, 127 S.W.3d at 649-50 (invalidating an ordinance purporting to impose civil fines upon employees of ABC licensees where such fines were not contemplated by the Legislature).[16] Here, the Ordinance does just that, by co-opting the Legislature's established enforcement mechanism under the Wages and Hours Law, which provides dual avenues for relief, applicable throughout the Commonwealth.

[16] A local government is without authority, whether it is co-opting the Legislature's established enforcement machinery in a way the Legislature has not contemplated, or purporting to impose its own penalty for a violation of a state statute. *See Jones v. City of Paducah*, 157 Ky. 781, 164 S.W. 101, 102 (1914) ("A violation of a state statute by all accounts does not give a city or local government the authority to impose a penalty for that violation not contemplated by the legislature.").

One avenue for relief is through the Kentucky Department of Labor administrative process. *See* KRS 337.310; 803 KAR 1:035. The other is through a civil action:

> Every employer doing business in this state shall, as often as semimonthly, pay to each of its employees all wages or salary earned to a day not more than eighteen (18) days prior to the date of that payment. Any employee who is absent at the time fixed for payment, or who, for any other reason, is not paid at that time, shall be paid thereafter at any time upon six (6) days' demand. No employer subject to this section shall, by any means, secure exemption from it. Every such employee shall have a right of action against any such employer for the full amount of his wages due on each regular pay day. The provisions of this section do not apply to those individuals defined in KRS 337.010(2)(a)2.

KRS 337.020; *see also* KRS 337.385(1) ("any employer who pays any employee less than wages and overtime compensation to which such employee is entitled under or by virtue of KRS 337.020 to 337.285 shall be liable to such employee affected for the full amount of such wages and overtime compensation . . . .").

Neither the Kentucky Constitution nor the Kentucky Revised Statutes grant Louisville the authority to create such a private judicial cause of action. Indeed, a recent federal court case out of Louisville held that a local ordinance cannot do so in the absence of explicit legislative authorization. *Robertson v. Brightpoint Servs., LLC*, 2008 U.S. Dist. LEXIS 23020 (W.D. Ky. 2008) (no private right of action to enforce local civil rights ordinance, even where ordinance attempted to provide such right) (R. 74-77, attached at Tab G).

As noted above, the Ordinance makes unlawful that which is expressly licensed, authorized, and permitted by KRS Chapter 337: paying an employee any wage ranging from $7.25 - $8.99 an hour. Thus, in commandeering KRS 337.020 and .385 to provide a cause of action arising from violations of the Ordinance, Louisville has created a cause of

action that rights a wrong not covered by KRS Chapter 337 – a violation of the precepts underlying the *Robertson* court's reasoning. More significantly, Louisville created a cause of action that actually ***conflicts*** with KRS Chapter 337, because the Ordinance prohibits that which KRS Chapter 337 permits. Accordingly, the Ordinance's attempt to co-opt the provisions of KRS Chapter 337 by authorizing any employee who is paid less than the minimum wage established under the Ordinance to bring a civil cause of action is an invalid exercise of Louisville's authority. Louisville simply lacks the authority to create a private right of action for violations of the Ordinance, and its attempt to do so is invalid and unenforceable as a matter of law.[17]

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the Circuit Court, and grant them declaratory and injunctive relief, barring enforcement of Louisville's invalid Ordinance.

[17] It is the province of the Legislature, not local governments, to determine what burdens the State's courts should bear. *Accord Johnson v. Commonwealth*, 449 S.W.3d 350, 355-56 (Ky. 2014) (Cunningham, J., concurring) (lamenting the multiplicity of local ordinances attempting to criminalize a "cornucopia of crimes" and noting that Louisville Metro Government, through a vicious dog ordinance, is "essentially rewriting the Kentucky Penal Code and is, therefore, invading the province of the Legislature"); *see also Stansbury v. Maupin*, 599 S.W.2d 170, 172 (Ky. 1980) (Louisville's home rule powers did not include power to issue subpoenas).

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